

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Appropriate Framework for Broadband)	
Access to the Internet over Wireline Facilities)	CC Docket No. 02-33
)	
Universal Service Obligations of Broadband)	
Providers)	
)	
Computer III Further Remand Proceedings:)	CC Docket Nos. 95-20, 98-10
Bell Operating Company Provision of)	
Enhanced Services; 1998 Biennial Regulatory)	
Review – Review of Computer III and ONA)	
Safeguards and Requirements)	

**REPLY COMMENTS OF
ALLEGIANCE TELECOM, INC.**

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Dated: July 1, 2002

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Allegiance Telecom, Inc. (“Allegiance”) respectfully submits these reply comments in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

The overwhelming majority of the initial comments reflect the view that the tentative conclusions the Commission reached in the *NPRM* are incorrect. With the exception of the Regional Bell Operating Companies (“RBOCs”) and a few of their industry organizations, the parties agree that the transmission component of wireline broadband Internet access services is a telecommunications service that must remain subject to Title II common carrier regulation. This result is not surprising because the Communications Act, the Commission’s own rules, legal precedent, and public policy require that transmission services, whether narrowband or broadband, be regulated as common carriage under Title II.

¹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, FCC 02-42 (rel. Feb. 15, 2002) (“*NPRM*”).

State commissions, the Secretary of Defense, consumer groups, the entire competitive industry, Internet Service Providers (“ISPs”), and even incumbent local exchange carriers (“ILECs”) that are not RBOCs all agree that the Commission does not have the authority to “deregulate” wireline broadband services and that even if it has such authority, it would be unwise to use it as proposed in the *NPRM*. While this near-unanimity of diverse, and often opposing interests, by itself is a sufficient reason not to adopt the *NPRM*’s tentative conclusions, the record in this and other proceedings demonstrates that conversion of ILEC broadband services to unregulated private carriage would not achieve the Commission’s broadband goals.

In the RBOC regions, it is lack of demand, not insufficient supply, that is limiting the consumption of broadband services. The 1996 Act’s supply-side policy of encouraging investment and innovation through the competition that is promoted by unbundling is working. Reversing this policy now and adopting the tentative conclusions in the *NPRM* will not promote broadband. Rather, it would (1) reduce RBOC incentives to construct broadband networks, (2) potentially bankrupt rural ILECs that are actually trying to deploy broadband networks to rural America (as opposed to the RBOCs who are selling off their rural access lines), (3) impede the efforts of competitors to construct and build out their own networks, (4) limit the ability of ISPs to provide new and innovative services, and (5) undermine the very regulatory certainty that the Commission has heretofore advocated. Congress is actively considering a number of measures that would better define the interplay between the national policies of promoting broadband and promoting competition. The Commission should not attempt to do what Congress has so far declined to do, namely sacrifice competition in the blind hope that such a sacrifice will further promote broadband deployment.

Initial comments also starkly reveal the error of using a definitional approach to “deregulate” broadband. The definitional reclassification trick cannot be squared with the plain text of the Act, Congressional intent, or important policy considerations. The D.C. Circuit has in the recent past rejected other Commission attempts at legal jujitsu to avoid Section 251(c) obligations. The *NPRM* is merely the latest tortured statutory interpretation the Commission has

proffered in an attempt to achieve a pre-determined policy goal. Application of Title II and unbundling requirements to the transmission component of wireline broadband Internet access service is consistent with the statutory definitions while classifying broadband transmission service as private carriage or an information service to avoid Title II obligations is not. Because the Act's service definitions limit the Commission's discretion to deregulate broadband services in the manner in which it proposes, neither the RBOCs' claim of unequal treatment nor the D.C. Circuit's recent UNE remand decision is relevant to the conclusion the Commission must reach in this proceeding.

There is no compelling reason or lawful basis for the Commission to abolish Title II regulation of ILEC broadband services or *Computer Inquiry* safeguards. The Commission does not have the authority to convert ILEC broadband services to private carriage, and even if it could do so, it should not, because of the strongest possible policy considerations. The RBOCs have failed to justify the radical deregulatory steps they urge the Commission to take.

Neither the *Cable Modem Declaratory Ruling* nor RBOC claims of rights to equal treatment provide any basis for reclassification of the transmission component of wireline broadband Internet access service as private carriage. At the very least, the Commission erred in determining that cable operators providing telecommunications services, including voice telephone services, are not subject to Title II or *Computer Inquiry* safeguards. Although the Commission's waiver of *Computer Inquiry* unbundling obligations was also erroneous because the Commission did not develop a record that supports grant of a waiver, or address its own standards for waiver under *WAIT Radio*, its ruling nonetheless was correctly premised on the view that Title II was applicable to cable operators.

For these reasons, the Commission should affirm continued application of Title II and *Computer Inquiry* safeguards and unbundling obligations to the transmission component of wireline broadband Internet access service. Because the Commission may deregulate under Section 10, maintaining the classification of wireline broadband transmission services as common carrier services does not preclude a targeted deregulatory approach. In determining

which common carrier services may be eligible for deregulation, however, the Commission must follow the standards prescribed by Congress, not make an end run around those standards through the guise of reclassifying existing telecommunications services as information services.

II. EVEN IF BROADBAND SUPPLY IS TRULY THE PROBLEM, CONGRESS, NOT THE COMMISSION, IS THE APPROPRIATE BODY TO ADOPT SUPPLY-SIDE INCENTIVES

A. Where DSL And Cable Modem Service Are Available, They Have Satisfied Pent-Up Demand

In mid-1999, Bell Atlantic essentially admitted that it had failed to predict and plan for the DSL craze:

We've never had a product with so much pent-up demand. With our customers clamoring for speed, we're doubling the pace of our deployment to bring Infospeed DSL to many new markets and communities this year.²

However, times have changed since 1999. As the initial comments of several state commissions show, the problem with broadband deployment is not the supply, but the demand for such services.³ For example, the Oregon Commission submitted that “the larger problem for widespread deployment seems to be that consumers generally do not subscribe to broadband services even when they are available.”⁴ Consumer groups also agreed that the problem with broadband deployment is not with supply but with demand.⁵ As a result, focusing on policies to promote supply is not the right approach.⁶ As the New York Times recently reported, Metromedia Fiber Network Inc. filed for bankruptcy protection after “failing to win enough

² Bell Atlantic Doubles Infospeed DSL Deployment, *Company to Make 17 Million Lines DSL-Capable this Year*, Press Release (July 28, 1999), <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=36033>.

³ See Florida PSC at 5; Oregon PUC at 1, 3; Ohio PUC at 33; Wisconsin PSC at 2.

⁴ Oregon PUC at 1.

⁵ See Arizona Consumer Council *et al.* at 12.

⁶ See Florida Public Service Commission at 5; Oregon Public Utility Commission at 2; Wisconsin Public Service Commission at 2.

customers for its ambitious plan to sell fast Internet service in urban areas.”⁷ Its demise was explained as follows:

Metromedia was once thought to have a promising future providing broadband connections in large American cities, but *demand for such services*, even in this complex and *relatively uncompetitive* niche of the telecommunications industry, did not keep up with expectations in the last year.⁸

The fact that demand has not kept up with supply is illustrated by the RBOCs’ own statistics. Although DSL is available to 25 million SBC customer locations, only 1.5 million customers (or 6% of SBC’s DSL-capable customer locations) have actually subscribed to SBC’s DSL service.⁹ Similarly, BellSouth’s DSL customer base of 729,000 subscribers is only a small fraction (7.5%) of the 9.7 million DSL-qualified households in BellSouth’s region.¹⁰ Notably, these “take” rates are even less than the 11% figure cited by the Commission in its *Cable Modem Declaratory Ruling*.¹¹ Thus the reality of RBOC broadband deployment to date support a conclusion that lack of demand, not lack of supply, has held back the pace of substitution of broadband for narrowband services.

The Organisation for Economic Co-operation and Development (“OECD’s”) recent White Paper concerning local loop unbundling¹² provides additional support for the conclusion that deregulating the ILECs’ provision of broadband services will not result in the additional deployment of such services. The OECD White Paper notes that when “xDSL technology first emerged on the market as a viable commercial product there was evidence that a number of incumbents were slow to invest in this technology.”¹³ The OECD determined that the reasons

⁷ Simon Romero, *Metromedia Fiber Files for Bankruptcy*, New York Times (May 21, 2002).

⁸ *Id.* (emphasis added).

⁹ SBC DSL Internet Update (May 2002), http://www.sbc.com/images/press_room/press_kit/DSL_Internet?Update_May_2002.pdf.

¹⁰ Core Digital Network, BellSouth Investor Relations (March 31, 2002), http://www.bellsouth.com/investor/ir_busprofile_coredigital.html.

¹¹ *Cable Modem Declaratory Ruling* at ¶ 9.

¹² See OECD, *Developments in Local Loop Unbundling*, DSTI/ICCP/TISP (2002), White Paper (May 2, 2002).

¹³ *Id.* at ¶ 38.

for the lack of investment by ILECs in broadband technology include the fact that “xDSL was a threat to the existing ISDN customer base of incumbents” and “xDSL was a threat to the existing dial-up Internet customer base of incumbents.”¹⁴

The OECD’s White Paper concludes that only “[w]hen it became clear to incumbents that local loop unbundling would be adopted as a policy and that access to unbundled loops were to be regulated, the speed in which xDSL technology was introduced accelerated.”¹⁵ Intramodal competition, not intermodal competition, provided the catalyst for incumbents to deploy broadband services because if they chose not to, “new entrants would.”¹⁶ Thus, the creation of competition between carriers made possible by unbundling “[helped] in accelerating the deployment of broadband services . . . [and] put pressure on incumbents to increase efficiency.”¹⁷ This policy has worked and the Commission should not abandon it now.

B. Any Supply “Problem” Exists in Rural Areas That The RBOCs Do Not Serve

The so-called Fact Report attached to Verizon’s comments claims that DSL has only been deployed to 40% of U.S. homes.¹⁸ As noted recently by Senator Hollings, however, a vast majority of the RBOC lines are DSL capable: “Verizon already has 79 percent of their lines DSL capable, BellSouth has 70 percent and SBC and Qwest have 60 percent.”¹⁹ Since the RBOCs’ deployment rates are much higher than the overall 40% rate claimed by Verizon, the only logical conclusion is that the nation’s broadband policy needs to focus on stimulating supply in the areas served by rural ILECs, not by RBOCs.²⁰

¹⁴ *Id.*

¹⁵ *Id.* at ¶ 39.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Verizon Attachment 1, Broadband Fact Report at 5.

¹⁹ Hollings Statement at 2.

²⁰ Indeed, Verizon’s most recent Annual Report makes clear that Verizon is divesting, rather than investing in, its rural exchanges. *See, e.g., Verizon 2001 Annual Report* at 12 (“We have either sold or committed to sell wireline properties representing approximately 2.9 million access lines or 2.2% of the total Domestic Telecom

In contrast to the RBOCs, the rural ILECs contend that they cannot (and by implication will not deploy broadband services without the benefits they receive under a telecommunications service classification. Rural ILECs are steadfast in maintaining that Title II regulation should continue to apply to the telecommunications component of broadband Internet access whether provided on a bundled or unbundled basis.²¹ They argue that Title I classification threatens the viability of rural broadband investment and services because it will force rural companies to recover costs from broadband consumers, increasing rates dramatically and stalling deployment.²² Therefore, adoption of the Commission's proposed reclassification framework would in fact hinder, rather than promote, further deployment of broadband services to rural Americans, where it is most needed. Like the vast majority of parties that oppose Title I reclassification, the rural telephone companies agree that the better course of action is for the Commission to streamline or forebear from Title II regulation as needed.²³

C. Section 706 Does Not Require That the Commission Act Blindly to Promote Broadband at All Costs

Contrary to SBC's claim,²⁴ the Act does not require that the Commission take immediate action to reclassify DSL, remove *Computer Inquiry* requirements and remove other, alleged "barriers" to the RBOCs' deployment of other broadband services and facilities. Because the Commission has repeatedly found that advanced services are being deployed in a reasonable and timely manner, the obligation to take immediate action under Section 706(b) does not apply. As the Florida Commission noted, "[i]n light of this conclusion, it seems premature to alter the regulatory and policy framework until a clear market failure has been identified."²⁵

access line equivalents."'). The fact that these are rural exchanges can be inferred from the purchasers of the lines, CenturyTel and Alltel. *Id.* at 27.

²¹ NRTA at 13.

²² Western Alliance at 7-8.

²³ NRTA at 13; Western Alliance at 9, Nebraska Independent Cos. at 4-5.

²⁴ SBC at 27-28.

²⁵ Florida PSC at 10.

The question is whether the Commission may use one of the broadband promotion tools listed in Section 706(a) to the exclusion of, indeed at the expense of, another Section 706(a) tool. Specifically, may the Commission take action to remove so-called barriers to RBOC infrastructure investment by sacrificing competition in the local telecommunications market? Further, if the Commission may take such action, would it be consistent with the public interest? The Ohio Commission believes that:

the FCC's proposal is intended to promote the advancement of broadband services, but perhaps at the expense of local competition. Of course it is debatable whether the NPRM's tentative approach would actually promote advanced services competition. But consideration of the impact on local competition should be a paramount concern.²⁶

The D.C. Circuit has repeatedly taken the Commission to task for employing tortured statutory interpretations of the 1996 Act that ignore the Act's primary focus of promoting competition. For example, in reviewing the Commission's latest basis for denying CLEC compensation for terminating ISP-bound traffic, the Court found that "nothing in [Section] 251(g) seems to invite the Commission's reading, under which (it seems) it could override virtually any provision of the 1996 Act so long as the rules it adopted were in some way, however remote, linked to LECs' pre-Act obligations."²⁷ Similarly, when the Commission tried to restrict the definition of incumbent LEC to exclude their advanced services affiliates, the D.C. Circuit chastised the Commission for trying to circumvent the statutory scheme adopted by Congress.²⁸ The Commission should not make a similar mistake of designing regulations that promote Section 706 goals at the expense of other explicit requirements in the Act.

²⁶ Ohio PUC at 28.

²⁷ *WorldCom, Inc. v. FCC*, __ F.3d __, No. 01-1218, slip op. (DC Cir. 2002).

²⁸ *Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (DC Cir. 2001).

Indeed, the Oregon Commission questioned whether the Commission's proposed deregulatory approach would even meet its intended goal of increasing broadband deployment:

continued progress in the availability of broadband services raises a serious question as to whether even a *draconian change in regulation*, such as Title I treatment of wireline broadband services, would have any impact at all on their availability.²⁹

Allegiance submits that without the empirical evidence to show that current regulations are inhibiting the deployment of broadband,³⁰ the Commission may not sacrifice local competition, universal service, and consumer protections³¹ to encourage something *faster* than the "reasonable and timely" deployment of broadband. Any such action would not only be inconsistent with the Act, it would also be inconsistent with the public interest the Commission is charged with protecting. And as the Consumer Advocates pointed out, if wireline broadband services are not an advanced *telecommunications* capability, under the Commission's proposed reclassification, regulators would be precluded from using Section 706 and many state statutes to encourage their deployment.³²

D. Congress Is Addressing Whether Changes Should Be Made to the Act And Other Laws to Define And Promote A National Broadband Policy

To the extent the nation has an existing broadband policy, it is set forth in Section 706 of the Act. Because Section 706 was adopted at the same time as the market-opening provisions of the 1996 Act, the only reasonable interpretation is that Congress sought to promote both goals equally, and not to promote broadband at the expense of competition. The California PUC states

²⁹ Oregon PUC at 1 (emphasis added).

³⁰ See, e.g. Ohio PUC at 32 (FCC fails to provide any empirical support to show that reclassification of DSL to Title I will result in ubiquitous deployment of, and reasonable prices for, advanced services).

³¹ Arizona Consumer Council *et al.* at 8 ("Consumers will lose their protections under the Communications Act because the Commission will deregulate an important area of telecommunications through a back door that Congress did not allow, when it could never sustain that deregulation if it came through the front door that Congress clearly provided.")

³² Pennsylvania Office of Consumer Advocate *et al.* at 22.

that Congress intended ILECs to share their last mile facilities and did not intend to exempt bottleneck facilities simply because they use broadband technology.³³ The Oregon Commission correctly asserts that the differences between narrowband and broadband services (namely speed) do not justify a new type of regulation for broadband transmission services.³⁴ The Congressional statements SBC cites in support of Section 706's broadband policy³⁵ are not to the contrary, because they merely acknowledge the convergence of mediums, and do not rank the goals of Section 706 above the other market-opening goals of the 1996 Act. As other state commissions point out, Title I regulation of wireline broadband services and associated local transmission facilities will harm local competition and the Commission should not promote one Congressional goal (deployment of advanced services) at the expense of a more fundamental goal (local competition).³⁶

For at least the past two years, the RBOCs have tried to convince Congress to adopt their parity argument and gut Section 251 of the Act. Most of the RBOCs make no attempt to hide the fact that this is also one of their ultimate goals for this proceeding.³⁷ Although Qwest is more subtle than the others, its comments show that at the same time that the RBOCs argue for regulatory parity with cable providers, they also seek regulatory disparity that would provide them advantages over their intramodal competitors. Qwest argues that a competitor's right to access a network element under Section 251(c)(2) turns on the competitor's use of the network element to provide a telecommunications service.³⁸ Under Qwest's "progressive" theory, intramodal UNE-based competition would continue because CLECs would be able to compete (operating as common carriers with common carrier obligations) with ILECs (operating as

³³ California PUC at 15.

³⁴ Oregon PUC at 2.

³⁵ SBC at 11-12.

³⁶ OH PUC at 29; Illinois CC at 5-8.

³⁷ BellSouth at 17-18; SBC at 7, 31-32; Verizon at 32-34.

³⁸ Cf. Qwest at 11 and SBC at 32; Verizon at 33.

private carriers that could tailor their service offerings) in providing broadband transmission services to ISPs.³⁹ This, of course, is the flip side of the parity the RBOCs' seek *vis-à-vis* their cable competitors. It is therefore the height of hypocrisy for Qwest to claim that its proposed resolution of the issues raised in the *NPRM* "would not itself" eliminate opportunities for intramodal competition over ILEC facilities.⁴⁰ There is no question that in their quest for intermodal "parity," all of the RBOCs also seek a means to thwart intramodal competition.

The fact that the RBOCs are explicitly trying to undo the market-opening provisions of Sections 251 and 252 with respect to their broadband services, and that, to date, Congress has failed to amend the Act to adopt the RBOCs' preferred policy outcome, should give the Commission pause. As Senate Commerce Committee Chairman Hollings recently noted:

I believe it is through a combination of policies such as – competition, loan programs, tax credits, consumer privacy protections, and addressing the "demand" problem – that broadband can be achieved. There is no silver bullet here, and an approach that destroys competition will undoubtedly undermine the deployment of broadband and other innovations. Such an outcome would set communications policy back for decades.⁴¹

Congress, not the Commission, is the body with the principal authority to set the nation's communications policy. Numerous measures intended to promote broadband are currently pending before the Congress. The Commission should not step in and, *ultra vires*, attempt to do what Congress has so far declined to do.

³⁹ Qwest at 18, 21. Of course, unless they build their own facilities, CLECs would not be able to compete with Qwest in providing only bundled broadband Internet access service to end users, a service which a CLEC is not entitled to provide using UNEs under Qwest's theory. Qwest at 11-12.

⁴⁰ Qwest at 8, 21.

⁴¹ Hollings Statement at 1.

III. THE 1996 ACT DOES NOT AUTHORIZE THE COMMISSION TO “DEREGULATE” TITLE II SERVICES TO FOSTER A RBOC/CABLE DUOPOLY IN TELECOMMUNICATIONS SERVICES AND INFORMATION SERVICES

Even the RBOCs admit that most broadband markets are not competitive. First, their so-called Fact Report addresses competition in only the “mass market” (their term for residential consumers) and the large business market for broadband services. The RBOCs point to no evidence of competition in the small and medium enterprise (“SME”) market targeted by Allegiance and other CLECs. In fact, what little anecdotal evidence the RBOCs do present for the SME market points to CLECs, not cable providers, as the RBOCs’ largest competitors.⁴²

Second, even in the mass market, the Fact Report admits that only one-third of households currently have access to both cable modem and DSL service⁴³ and that “[i]n many markets in the U.S. today, only one or two of the four possible broadband alternatives is currently available.”⁴⁴ Comments filed by the state regulatory commissions indicate that the marketplace for broadband services is highly stratified between cable operators and ILECs, with very little competition between the two platform providers. A number of state regulatory commissions question whether intermodal competition will act as a restraint on the price for DSL service since cable operators and ILECs rarely compete for the same customers and other platform providers of broadband services are non-existent.⁴⁵ The California Public Utilities Commission emphasized that SBC is the dominant provider of broadband services to residential and small commercial customers in its service territory.⁴⁶ Specifically, the California Commission stated that 45% of Californians who live in areas with broadband capability have

⁴² See Verizon Attachment 1, Broadband Fact Report at 19-20 (“most CLECs that provide DSL service focus on the small business market”) and 5 (“Cable operators also are *beginning* to extend their cable networks to ... serve small and medium-sized business customers” and have recently begun business trials of such service) (emphasis added).

⁴³ Verizon Attachment 1, Broadband Fact Report at 1.

⁴⁴ Verizon Attachment 1, Broadband Fact Report at 12.

⁴⁵ Florida PSC at 4; Illinois CC at 24; Oregon PUC at 2.

⁴⁶ California PUC at 34-37.

only DSL, not cable modem service, available. And even in areas where cable modem service is available, the physical plants generally do not overlap to give a *particular household* an actual choice between DSL and cable.⁴⁷ As the Joint Consumers showed, cable dominates the residential broadband market (with a 75% market share) and DSL⁴⁸ dominates the non-residential market (with an 89% market share).⁴⁹ Finally, as the Florida Commission argued, because different broadband platforms have different availability and performance criteria, these platforms are not actual substitutes for one another. To the contrary, “consumers in markets with only one provider per technology platform for broadband service may really be faced with no choice at all, depending on their specific needs.”⁵⁰ State regulatory commissions do not describe a vibrant competitive marketplace for broadband services but instead show a landscape of monopoly providers where most areas are dominated by only one provider of broadband services.⁵¹ In light of these facts, all of the commenting state regulatory commissions agree that ILECs should continue to be regulated in their provision of broadband services.⁵²

Third, if the RBOCs, who collectively provide millions of DSL lines to consumers, can characterize themselves as “secondary” market players that pose no threat to cable companies unless they are freed from the shackles of regulation, it is ridiculous for them to claim that “unregulated” wireless providers, who collectively provide only 100,000 broadband access

⁴⁷ California PUC at 35-36.

⁴⁸ The DSL market is clearly dominated by the RBOCs. As of June 30, 2001, competing local exchange carriers only provided 7% of the ADSL high speed lines, while the RBOCs provided nearly 87%. See “High-Speed Services for Internet Access: Subscribership as of June 30, 2001,” Industry Analysis Division, Common Carrier Bureau, Feb. 2002, Table 5.

⁴⁹ Arizona Consumer Council *et al.* at 59.

⁵⁰ Florida PSC at 4.

⁵¹ California PUC at 35-36; Florida PSC at 4; Illinois CC at 24; Ohio PUC at 33.

⁵² California PUC at 36; Michigan PSC at 2; Minnesota Department of Commerce at 7; New York State Dept. of Pub. Serv. at 2-3; Oregon PUC at 2-3; Ohio PUC at 33; Texas Attorney General’s Office at 4; Vermont Board at 6-9; Wisconsin PSC at 2.

lines,⁵³ make the U.S. broadband market a multi-competitor market subject to true and open competition.

As Congressman Markey recently noted, “the ’96 act was not a deregulation bill. It was a de-monopolization bill.”⁵⁴ While Congress expected cable companies to enter the local phone markets and ILECs to enter the video services markets, it also expected other providers to enter and compete in the telecommunications and information services markets. Congress did not intend for the Commission to deregulate RBOC monopolists in order to foster an unregulated RBOC/cable duopoly in broadband services in some markets and maintain a RBOC monopoly in other broadband markets where cable companies do not compete.⁵⁵

Furthermore, Congress’s adoption of Section 10 indicates that the Commission is restricted in its ability to “deregulate” RBOC broadband services by reclassifying them as private carriage. Section 10 permits the Commission to forbear from imposing certain regulations on telecommunications carriers and telecommunications services if such regulation is not necessary to ensure non-discriminatory and just and reasonable rates, terms and conditions, is not necessary to protect consumers, and is in the public interest.⁵⁶ Section 10 would, however, be rendered meaningless if the Commission may reclassify certain ILEC services as information services or private carriage rather than common carriage in order to achieve deregulation. As the California Commission warned:

There is no evidence that Congress intended that the FCC could achieve the same [deregulatory] result prematurely by unilaterally redefining fundamental terms in the Act, and effectively nullifying section [10]. The FCC cannot accomplish by regulatory fiat what Congress alone has the authority to change.⁵⁷

⁵³ Verizon Attachment 1, Broadband Fact Report at 1.

⁵⁴ Telecommunications Competition and Broadband Deployment: Hearing of the Senate Commerce, Science and Transportation Committee, May 22, 2002 (statement of Rep. Markey (D-MA)).

⁵⁵ California PUC at 36-37.

⁵⁶ 47 U.S.C. § 160.

⁵⁷ California PUC at 15.

Congress did not adopt Section 10 only to have the Commission search for another means to deregulate regulated services on its own terms. Rather, Congress recognized that regulated services should be deregulated through forbearance, when appropriate, that meets the standards of Section 10. As the United Church of Christ, *et al.* state, defining broadband services as information services would unlawfully remove these services from the scope of Section 251 and 252 because this would amount to *de facto* forbearance in violation of the standards of Section 10.⁵⁸

Nor does the RBOCs' attempt to separate completely their broadband facilities and services from their local monopoly justify an end run around Section 10. First, contrary to the RBOCs' arguments, ILECs are not "relative newcomers in the broadband market."⁵⁹ ILECs have offered customers high-speed (over 200 kbps) services for decades, albeit as special access services at rates that only businesses could afford. ILECs have also offered ISDN services, at higher speeds than dial-up Internet access permits, to their residential and small business customers since the early 1990s. ILECs finally *supplemented* their broadband offerings in 1997 when they began market testing and deployment of DSL service.⁶⁰ In contrast, cable companies did not begin deploying broadband cable modem service until 1996, well after the RBOCs had deployed high-speed services to their business customers and ISDN to their residential customers. Therefore the RBOCs' claim that they are relative newcomers to the broadband market does not even pass the straight face test. Further, as discussed in detail in Section VI.C below, the RBOCs' claim that their broadband networks can be separated from their local monopoly networks is equally absurd.

⁵⁸ United Church of Christ *et al.* at 14.

⁵⁹ Qwest at 31.

⁶⁰ *SBC Companies Introduce High-Speed DSL Internet Services*, Press Release (Nov. 14, 1997), http://www.sbc.com/press_room/news_search/1,5932,31,00.html?query=19971114-1 ("To *supplement its existing line of broadband services*, SBC Communications Inc. today announced it is introducing high-speed Digital Subscriber Line (DSL) services through its Pacific Bell and Southwestern Bell telephone subsidiaries.") (emphasis added).

The Commission has not even posed the questions necessary to evaluate whether forbearance is appropriate under Section 10. This shows that the Commission is trying to make an “impermissible end run”⁶¹ around Section 10 by moving broadband services from one definition to another, rather than applying the standards for deregulation adopted by Congress. The D.C. Circuit has rejected similar attempts by the Commission. When the Commission tried to let ILECs escape their Section 251(c) duties with respect to advanced services, the Court rejected the Commission’s tortured statutory interpretation:

The Commission insists that it is not actually “forbearing” but rather interpreting § 251(c) not to apply to this affiliate structure. In other words, the definition of ILEC in § 251(h) does not explicitly mention affiliates, so the Commission claims authority to determine case by case whether a particular affiliate is an incumbent LEC or not. When it does so it is interpreting the statute rather than determining whether to forbear.

We think appellant’s argument is a powerful one. Although the Commission has not explicitly invoked forbearance authority (in direct violation of § 10), to allow an ILEC to sideslip § 251(c)’s requirements by simply offering telecommunications services through a wholly owned affiliate seems to us a circumvention of the statutory scheme.⁶²

Congress has given the Commission the means to deregulate RBOC facilities and services that are subject to Title II regulation and the Commission may not circumvent the Section 10 procedures prescribed by Congress.

IV. THE RBOCs’ PARITY ARGUMENTS DO NOT WITHSTAND SCRUTINY

The RBOCs assert two main arguments in support of their so-called right to regulatory parity. First, they claim loudly and often that the Commission must adopt its tentative conclusions in the *NPRM* and remove their broadband services from *Computer Inquiry* requirements because to do otherwise would be in direct conflict with the *Cable Modem Declaratory Ruling*.⁶³ Second, they claim that the Act and equal protection principles support

⁶¹ California PUC at 3.

⁶² *Ass’n of Communications Enterprises v. FCC*, 235 F.3d 662, 666 (DC Cir. 2001).

⁶³ See, e.g., BellSouth at 11, 14-15, 24; SBC at 1, 4, 19; Verizon at 10, 23-30.

imposing the same regulations (or lack thereof) on “like services.” Allegiance shows the fallacy of each of these arguments below.

A. The *Cable Modem Declaratory Ruling* Can Be Distinguished and Is Not Binding in This Proceeding

Allegiance submits, and many commenters showed, that the *Cable Modem Declaratory Ruling* is inconsistent with Commission precedent. Furthermore, the *Cable Modem Declaratory Ruling* can be distinguished from the matters at issue here in a number of respects. In the *Cable Modem Declaratory Ruling*, the Commission determined that cable modem service is a single offering of an information service without a separate offering of a telecommunications service based a careful factual examination of cable operators current practices. The Commission stated that “[w]e are not aware of any cable modem service provider that has made a stand-alone offering of transmission for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.”⁶⁴ On the other hand, it found that cable operators did provide “open access” to some ISPs, but declined to do so for others. Therefore, the Commission concluded that cable operators do not make a common carrier offering of broadband transmission services but instead at most engaged in “private carriage.” Further, the Commission concluded on this basis that cable operators were not required to make a nondiscriminatory offering of their broadband telecommunications capability because they were only engaged in private carriage.

This approach to determining whether cable operators should be required to offer their broadband transmission capability on a common carrier basis provides no guidance for evaluation of wireline broadband Internet access, and was erroneous as applied to cable operators, because it permits the regulated entity to self-select its own mode of regulation simply by acting in its preferred way. In essence, the Commission concluded in the *Cable Modem Declaratory Ruling* that cable operators should continue to be free to discriminate against small

⁶⁴ *Cable Modem Declaratory Ruling* at ¶ 40.

ISPs by denying them access, and among other ISPs by dealing with them on different terms and conditions, because this is what cable operators were currently doing. Totally missing from the Commission's evaluation is a recognition that the Commission is responsible for applying Title II when it is in the public interest to do so. Because the Commission failed to perform any serious public interest evaluation of whether cable operators should be subject to nondiscrimination obligations, the *Cable Modem Declaratory Ruling* was arbitrary and unlawful. This by itself is sufficient reason to reject the *Cable Modem Declaratory Ruling* as providing any guidance for this proceeding.

The Commission also erred in that decision in determining that cable operators that provide telecommunications services, such as voice telephone service, are not already subject to Title II and *Computer Inquiry* safeguards. This is because the Commission's existing rules require all facilities-based carriers to provide information services as customers of their own nondiscriminatory unbundled offering of underlying transmission service. Thus, to the extent that cable operators are common carriers by virtue of providing voice telecommunications, they are subject to Title II and *Computer Inquiry* unbundling obligations, just like ILECs. Although the Commission's waiver of *Computer Inquiry* unbundling obligations was also erroneous because the Commission did not obtain a record for a waiver, or address its own standards for waiver under *WAIT Radio*, the waiver at least was correctly premised on the view that Title II and *Computer Inquiry* were applicable to cable operators.

Moreover, cable operators that do not provide voice telephone service, even assuming that the Commission's application of the statutory definitions to them is correct, are distinguishable from wireline providers because the latter are already subject to Title II. As stated above and explained further in these comments, the ILECs are required under the Act and the Commission's rules to unbundle transmission services from their information service offerings and the Commission may not under the Act remove that requirement on the basis of tortured interpretations of statutory terms. Therefore, the *Cable Modem Declaratory Ruling*, contrary to RBOC arguments, does not provide any guidance for issues raised in this proceeding.

B. Continued Regulation of RBOCs' Broadband Services Does Not Violate Their Rights to Equal Protection

The RBOCs' "like services" arguments are equally unconvincing. It is noteworthy that the RBOCs did not point to a specific section of the Act in support of their parity argument. This is because the section that is traditionally cited to support like treatment, Section 202(a), applies to like services provided by a single common carrier to similarly situated customers. The RBOCs do not, and cannot, claim that Section 202(a) compels the result they seek here.

Nor is a RBOC's right to equal protection violated by the Commission's *continued* regulation of the RBOC's broadband services and facilities. In any equal protection challenge, a RBOC would bear an extremely heavy burden to establish that such regulation violates the Constitution. Where, as here, the impact of the regulation is economic and no fundamental right is involved,⁶⁵ the courts will not invalidate the Commission's actions on equal protection grounds unless "the classification rests on grounds wholly irrelevant to the achievement of [the governmental] objective."⁶⁶ This is because economic regulation "carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality."⁶⁷

The equal protection clause does not forbid classifications, and the requirement of equal protection is satisfied so long as there is a plausible policy reason for the classification.⁶⁸ Moreover, "treating two groups differently does not necessarily violate the equal protection."⁶⁹

⁶⁵ Although Verizon implies that a fundamental right is impacted (*e.g.*, the right to free speech), Verizon at 27-30, it nevertheless discussed whether the Commission's continued regulation of ILECs would survive the rational basis test. Thus even Verizon admits that the lowest level of scrutiny would apply on review of any equal protection claim it would assert in this area. While intermediate scrutiny may apply to any claim that Verizon's right to free speech is violated, even under this higher standard, the courts have repeatedly found that classifications imposing economic burdens on a medium of delivering speech do not violate the BOCs' First Amendment rights. *See, e.g., SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 524 U.S. 1113 (1999) (Section 274 separate subsidiary requirements for BOC entry into electronic publishing market do not violate the First Amendment); *BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C. Cir. 1998) (same).

⁶⁶ *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

⁶⁷ *Hodel v. Indiana*, 452 U.S. 314 (1981).

⁶⁸ *Nordlinger v. Hahn*, 505 U.S. 1 (1992).

⁶⁹ *California Ass'n of the Physically Handicapped, Inc. v. FCC*, 721 F.2d 667, 670 (9th Cir. 1983) (FCC did not deprive handicapped persons of equal protection by refusing to include them in its EEO program). *See also Soon Hing v. Crowley*, 113 U.S. 703, 734 (1885) ("it is not discriminating legislation in any invidious sense that

To the contrary, “[d]efining the class of persons subject to a regulatory requirement... ‘inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.’”⁷⁰ As the Commission has previously recognized, the same deferential standard applies to legislative and administrative classifications alike and the “Supreme Court has held that ‘[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.’”⁷¹ In short, so long as the Commission has a rational basis to *retain* its current regulations that classify wireline broadband transmission service as a telecommunications service that RBOCs must offer separately pursuant to tariff, which it does, its decision to regulate the transmission component of wireline broadband Internet access but not cable Internet access will survive any equal protection challenge.

The RBOCs’ historical monopoly in the local telephone market, the restrictions placed on the RBOCs’ ability to enter other lines of business (first through the Modified Final Judgment and later through Sections 271-275 of the Act), and the national policy of promoting competition in local wireline markets are more than adequate reasons to stay the course. The Commission has drawn, and may draw, a line that requires RBOCs participating in the broadband market to be subject to regulation under Title II of the Act, including Section 251(c) unbundling rules and *Computer Inquiry* safeguards. Such continued regulation is consistent with the principles established in the 1996 Act, namely that the RBOCs’ historical monopoly justifies restricting

branches of the same business from which danger is apprehended are prohibited... while other branches involving no such danger are permitted.”).

⁷⁰ *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993).

⁷¹ *Communique Telecommunications, Inc. d/b/a Logically Application for Review of the Declaratory Ruling and Order Issued by the Common Carrier Bureau; InterContinental Telephone Corp. Petition for Declaratory Ruling on National Exchange Carrier Ass’n, Inc. Tariff F.C.C. No. 5 Governing Universal Service Fund and Lifeline Assistance Charges*, 14 FCC Rcd 13635, ¶ 33 (1999).

and/or placing conditions on their participation in other lines of business, whether or not they are dominant or new entrants in those other markets.⁷²

V. TITLE II REGULATION OF BROADBAND TRANSMISSION SERVICES DOES NOT SLOW DEPLOYMENT OF BROADBAND SERVICES

As demonstrated in the Commission's own findings⁷³ and the overwhelming majority of comments,⁷⁴ broadband deployment is occurring in a "reasonable and timely manner" and "[i]nvestment in infrastructure for advanced telecommunications remains strong."⁷⁵ The fact that this investment and deployment occurred during a time when RBOCs were subject to Title II regulation of their broadband services shows that Title II regulation has not slowed deployment of broadband services. To the contrary, when SBC announced its \$6 billion Project Pronto initiative to deploy a broadband network, it explicitly recognized that "unlike cable modem service, our lines are open to competitors – so our deployment won't just benefit SBC and our customers, it will benefit other DSL providers as well."⁷⁶ Moreover, the Bells continue to invest in broadband despite the current Title II regulation of broadband services.⁷⁷ SBC boasts that it has placed more than 2 million miles of fiber optic strands across its 13-state region since it began deploying DSL services⁷⁸ and BellSouth touts more than 4.1 million miles of fiber and 800 broadband switches deployed in its nine-state region.⁷⁹ Thus, contrary to the RBOCs'

⁷² See *SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 524 U.S. 1113 (1999) (Sections 271-275 restrictions on BOCs are not inconsistent with the equal protection clause).

⁷³ *Deployment of Advanced Telecommunications Capability to All Americans In a Reasonable and Timely Fashion, Third Report*, 17 FCC Rcd. 2844, ¶ 1 (2002) ("*Third Section 706 Report*").

⁷⁴ See e.g., AT&T at 1-2.

⁷⁵ *Third Section 706 Report* at ¶ 1.

⁷⁶ *SBC to Offer DSL Internet Through Neighborhood Gateways*, Press Release (Sept. 8, 2000), http://www.sbc.com/press_room/news_search/1,5932,31,00.html?query=20000908-1.

⁷⁷ *Third Section 706 Report* at ¶ 69.

⁷⁸ *SBC DSL Internet Update* (May 2002).

⁷⁹ *BellSouth Investor Relations Core Digital Network* (March 31, 2002).

arguments, deregulation of broadband services is not essential to the future deployment of these services and facilities.⁸⁰

The RBOCs made a related argument in their unsuccessful challenge of the Commission's TELRIC pricing method.⁸¹ In that case, the RBOCs argued that the Commission's use of TELRIC pricing for unbundled network elements was unreasonable as a matter of law because it failed to produce facilities-based competition.⁸² In response, the Supreme Court cited the \$55 billion investment by new entrants between the years 1996 and 2000, finding that "a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities."⁸³ More importantly, the Court noted that TELRIC pricing did not stifle the RBOCs' incentive to invest in new network elements, citing the RBOCs' \$100 billion investment over this same four-year period.⁸⁴ The Court concluded that "so long as TELRIC brings about some competition, the incumbents will continue to have incentives to invest and improve their services to hold on to their existing customer base."⁸⁵ This same analysis holds true for broadband transmission services. As BellSouth has explained to the investment community, the data market with the most potential for revenue growth is *local* data services.⁸⁶ That is why BellSouth, "[t]o meet the converging needs of customers," is "transforming the technology in our core wireline network from analog voice to digital data."⁸⁷

⁸⁰ BellSouth at 4; Verizon at 6; SBC at 9; Qwest at 2.

⁸¹ *Verizon Communications, Inc., et al. v. Federal Communications Commission*, 535 U.S. ___, 122 S. Ct. 1646 (2002).

⁸² *Id.* at 45.

⁸³ *Id.* at 46.

⁸⁴ *Id.* at n. 33.

⁸⁵ *Id.*

⁸⁶ Bill Smith, Chief Technology Officer, BellSouth, Presentation to Goldman Sachs Telecom Issues Conference 2002, http://media.corporate-ir.net/media_files/nys/bls/presentations/bls_050702/sld007.htm.

⁸⁷ *Connecting to What's Important*, BellSouth 2001 Report to Shareholders, 1 (2002).

So long as their customers demand broadband services, the ILECs will have the incentive to invest in and deploy broadband facilities and services.

VI. RECLASSIFYING THE BROADBAND TRANSMISSION SERVICE THAT UNDERLIES BROADBAND INTERNET ACCESS AS A “COMPONENT OF AN INFORMATION SERVICE,” OR AS PRIVATE CARRIAGE, IS CONTRARY TO THE ACT

A. The Current Framework Is Consistent With Statutory Definitions

The Commission’s requirement that carriers offer information service over their own facilities as customers of their own tariffed telecommunications services is consistent with the statutory definition of “information service.” That term is defined in the Act as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making information available via telecommunications ...”⁸⁸ “Telecommunications service” is defined in the Act as “the offering of telecommunications for a fee directly to the public...”⁸⁹ The *NPRM* reasoned that when a carrier provides broadband Internet access service over its own facilities, it is using telecommunications, but not offering it to anyone, and that, therefore, the transmission component of wireline broadband Internet access is not a telecommunications service. By operation of the Commission’s own rules, however, carriers offering broadband Internet access service over their own facilities do so as customers of their own tariffed telecommunications service.⁹⁰ Further, because “telecommunications service” by definition encompasses “telecommunications,” wireline broadband Internet access service under the Commission’s rules is offered via telecommunications as well as by means of a telecommunications service. Therefore, the current regulatory framework is completely

⁸⁸ 47 U.S.C. § 3(20).

⁸⁹ 47 U.S.C. § 3(46).

⁹⁰ See, e.g., *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling and American Telephone and Telegraph Company Petition for Declaratory Ruling, Memorandum Opinion and Order*, 10 FCC Rcd. 13717, 13719 (1995) (“*Frame Relay Order*”); *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd. 4562, 4580 (1995).

consistent with the statutory definitions of “information service,” “telecommunications,” and “telecommunications service.”

The *NPRM*, therefore, errs seriously to the extent it assumes that the Commission must change the current regulatory framework governing wireline broadband Internet access service based on the statutory definition of “information service,” “telecommunications service,” and/or “telecommunications.” These statutory definitions provide no basis for altering to any extent the current application of Title II and *Computer Inquiry* safeguards to wireline broadband Internet access service. It would be arbitrary and unlawful for the Commission to change the current framework based on the view that reclassification is required on the basis of the foregoing statutory definitions.

B. The Commission Does Not Have the Authority to Reclassify the Provision of Broadband Transmission Services as Private Carriage

The RBOCs erroneously presume that the Commission has unlimited discretion to reclassify the provision of broadband transmission services as private carriage. As is evident in the plain text of the law, legal precedent and the overwhelming evidence presented in this proceeding, however, the Commission does not have the authority to undertake such a radical reclassification of these services

The RBOCs admit, albeit grudgingly, that what the Commission seeks to do through its *NPRM* is to **reclassify** broadband services that are currently classified as telecommunications services subject to Title II regulation.⁹¹ They generally argue that the existing classifications are the product of “regulatory creep,” and that the existing classification was not a well-reasoned application of the statutory criteria to broadband services.⁹² To the contrary, numerous commenters traced the history of Commission determinations supporting the classification of

⁹¹ See, e.g., Verizon at 9, 41.

⁹² See, e.g., Verizon at 11-12.

ILEC broadband services as telecommunications services subject to common carrier regulation.⁹³ The *Cable Modem Declaratory Ruling* is the only aberration in a long line of controlling precedent.

The courts have explicitly held that the Commission does not have unfettered discretion in the classification of services.⁹⁴ Moreover, when Congress defined “telecommunications services” in the 1996 Act, it codified the difference between common carriage and private carriage.⁹⁵ Thus, the Commission cannot classify a service based solely on a policy goal of promoting broadband services.⁹⁶ Instead, the Commission must analyze the transmission component of wireline broadband Internet access services in the context of the statute and the test for common carriage set forth in *NARUC I* and *NARUC II*. Specifically, the Commission must determine whether the content of the transmission is under the customers’ control so that they “transmit intelligence of their own design or choosing”⁹⁷ and whether the carrier “holds [itself] out to serve the public indiscriminately.”⁹⁸ As demonstrated in this proceeding, the transmission component of wireline broadband Internet access services, whether provided on a retail or wholesale basis, meets the requirements of common carriage. This transmission service is a pure transmission path for access to content on the Internet that does not change the content or form of the information being transmitted. In fact, end users demand and expect that the transmission provider will not change the format or content of information received from third

⁹³ See, e.g., California PUC at 26-30 (“[T]he FCC’s gyrations used to reclassify broadband transmission services from Title II to Title I result in an arbitrary and capricious reversal of past federal policy.”); Ohio PUC at 5-17 (“[T]he FCC dooms its decision to failure under the legal standard required when it decides to change its past decisions.”)

⁹⁴ *Nat’l Assoc. of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) (“*NARUC I*”); *Nat’l Assoc. of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (“*NARUC II*”).

⁹⁵ AT&T at 16 (citations omitted).

⁹⁶ “A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.” *NARUC I*, 525 F.2d at 644. Even if the Commission were to base its decision solely on the goals of Section 706, it would find that Title II regulation of the broadband transmission services is necessary to promote competition and to encourage further deployment of advanced services to all Americans.

⁹⁷ *NARUC II*, 533 F.2d at 609.

⁹⁸ *NARUC I*, 525 F.2d at 642.

party sources.⁹⁹ This transmission service also is offered indifferently to the public. ILECs offer this service to thousands of ISPs generally and indiscriminately under standard rates, terms and conditions, in part because of the legal compulsion to serve under *Computer II/III*, but also because of the nature of the service.¹⁰⁰

The RBOCs do not dispute that broadband transmission services provided to ISPs qualify as telecommunications. Rather, they argue that the Commission must not look to the “facts” of how this service is offered but instead focus on the “policy” of promoting broadband to determine whether broadband transmission service is a telecommunications service subject to common carrier regulation. For example, in support of its private carrier classification argument, Qwest argues that by developing four separate broadband offerings¹⁰¹ designed to meet the individualized needs of the 400 independent ISPs to which it provides broadband service,¹⁰² Qwest provides broadband transmission service through “individualized” negotiations resulting in contracts “tailored to the needs of particular customers.”¹⁰³ Qwest therefore argues that the ISPs purchasing broadband transmission services from the ILECs are not the “public” for purposes of making a common carrier classification.¹⁰⁴ This simply is not true.

The term “public” for purposes of the common carrier classification is not limited to the public as a whole. The definition of telecommunications services specifically states that these services can be offered to “such classes of users as to be effectively available to the public.”¹⁰⁵ Moreover, the Supreme Court has recognized that such an offering to the public can involve even a small and narrowly defined class of users,¹⁰⁶ leaving no doubt that ISPs are “the public” for

⁹⁹ Cbeyond, *et al.* at 3.

¹⁰⁰ See Cbeyond, *et al.* at 29; AT&T at 18-19.

¹⁰¹ Qwest at 16, n.40.

¹⁰² Qwest at 30.

¹⁰³ Qwest at 16.

¹⁰⁴ Qwest at 17.

¹⁰⁵ 47 U.S.C. § 153(46).

¹⁰⁶ See AT&T at 19 (citing *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255 (1916)).

purposes of this classification.¹⁰⁷ The states agree that provision of broadband transport services is not private carriage.¹⁰⁸ They argue that the provision of such services meets the test under *NARUC* – *i.e.*, the service is held out indiscriminately to subscribers and offered on standard terms and conditions to both CLECs and ISPs.¹⁰⁹ The states also agree that the Commission does not have unfettered discretion to confer or not confer common carrier status.¹¹⁰ Therefore, the Commission must reject the RBOCs’ argument that their “wholesale service” offerings may qualify as private carriage not subject to Title II regulation.

In addition, there is no question that RBOCs still control the wireline transmission facilities used to provide broadband services,¹¹¹ and, as explained, CLECs have virtually no alternative options for local loops that can be used to provide integrated telecommunications and broadband information services, especially to residential and SME customers, and the ISPs have virtually no alternative options for broadband Internet access. The RBOCs’ continued dominance and market power over key broadband facilities and services require that such services be regulated as common carriage under Title II. Thus, contrary to Qwest’s claims,¹¹² the RBOCs’ provision of wireline broadband transmission services also fails to meet the requirements for private carriage and Title I “regulation” given their market power over these services. In light of market conditions, the Commission must regulate these services under Title II, rather than reclassify these services as private carriage to avoid regulation.

¹⁰⁷ NewSouth at 12-13.

¹⁰⁸ CA PUC at 30; ICC at 8-10; NYDPS at 3-4.

¹⁰⁹ CA PUC at 30-31.

¹¹⁰ CA PUC at 31.

¹¹¹ Cbeyond, *et al.* at 31; AT&T at 46-47.

¹¹² Qwest at 16.

C. “Integrated” Wireline Broadband Internet Access Service And “Separate” Voice And Data Networks Are A Fiction

The RBOCs urge the Commission to adopt the self-serving characterization of wireline broadband Internet access service as a naturally integrated service. Similarly, they describe *Computer III* unbundling requirements as “artificial.” For example, SBC states that a wireline provider should not be required “artificially to structure *any* of its broadband information services to create a separate telecommunications service offering.”¹¹³

However, the RBOCs’ characterization of “integrated” (*i.e.* free from unbundling obligations) wireline broadband Internet access service as “natural” is just another way of obscuring their request for permission to discriminate and should be rejected as such. State commissions unanimously oppose reclassification of wireline broadband as an information service. As the New York Department of Public Service states, this “tentative conclusion” is contrary to law because wireline broadband Internet access is not a unitary service, but rather a distinct telecommunications service *and* an information service.¹¹⁴ The Illinois Commerce Commission (ICC), citing Commission precedent, also takes the position that wireline broadband consists of both an information service and a telecommunications service element.¹¹⁵ The California Commission¹¹⁶ and the Ohio Commission agree that wireline broadband Internet access service is in part a telecommunications service.¹¹⁷

Because of competitive safeguards, the “integrated” provision of wireline broadband Internet access service is prohibited and does not exist. The Commission should continue to prohibit provision of this “integrated” service because removing the prohibition will allow the

¹¹³ SBC at 6.

¹¹⁴ New York PSC at 3,4 (citing to *Computer II* and prior enhanced service cases).

¹¹⁵ Illinois CC at 10 (citing, among other precedent the *Advanced Services Order* and the *Local Competition Third Report and Order* in which the Commission treated the same DSL services as composed to two services, one of which is unquestionably a telecommunications service).

¹¹⁶ California PUC at 10-17.

¹¹⁷ Ohio PUC at 14-15.

RBOCs the freedom to discriminate unless and until a truly competitive market develops to stop them.

Although wireline broadband Internet access services are not naturally integrated, the networks that support broadband services are naturally integrated with the narrowband voice network. However, in relying on the fiction that narrowband and broadband networks are “separate,” the RBOCs seek to achieve through this proceeding much more than what the Commission has proposed. For example, they have argued that:

- “The Commission should also use this proceeding as the paradigm for all future broadband technology, not just Internet access.”¹¹⁸
- “[T]he *Computer Inquiry* service-unbundling requirements are unnecessary not only for broadband Internet access, but also for any packetized broadband information service.”¹¹⁹
- “The Commission should expand its definition to cover these new services in order to eliminate regulatory obstacles to the development and deployment of such new technologies. . . . A broadband service is either a service that uses a packet-switched or successor technology, *or* a service that includes the capability of transmitting information that is generally not less than 200 kbps in both directions.”¹²⁰

These expansive arguments go beyond the Commission’s attempt to shoehorn all components of wireline broadband Internet access into an “information services” box. In short, it appears that the RBOCs would like the Commission to adopt a new statutory definition of broadband, packetized networks and services that would escape Title II regulation regardless of their classification as telecommunications services. Such pipe dreams implicitly assume that the RBOCs’ broadband networks and services, however defined, can be separated from their narrowband networks and services that would remain subject to Title II regulation. However, even the RBOCs admit that this network separation does not exist in practice. To the contrary,

¹¹⁸ BellSouth at 10, n.25.

¹¹⁹ SBC at 23.

¹²⁰ Verizon at 5-6.

Verizon states that “most local wireline network facilities are used to provide telecommunications services as well as information services.”¹²¹ And BellSouth boasts that it is “systematically transforming our core network from narrowband analog voice to broadband digital data ... through a disciplined strategy that targets investment and leverages capital into next-generation technologies and assets...”¹²² The Florida Commission agreed, arguing that the “local exchange market and the broadband market is inextricably joined.”¹²³

Because these networks and markets are inextricably joined, deregulation of broadband services and facilities will have adverse impacts on both the voice and data competition Congress sought to promote through the 1996 Act. First, it will grant the RBOCs license to stifle what little intramodal competition is preserved by imposing anticompetitive and delaying preconditions on a competitor’s right to access a UNE. The industry’s limited experience with other Commission “use tests” (namely, the EEL local usage test) shows that the RBOCs will welcome any Commission invitation to delve into their competitor’s offerings in an attempt to preclude, or at least delay, that competitor’s use of UNEs.¹²⁴

Second, because these markets are inextricably joined, adopting the Commission’s proposed approach will grant the RBOCs a distinct advantage in providing integrated packages of services to end users. As the Florida Commission argued:

Another aspect of the current market is the trend toward combining telecommunications service, data transport, Internet access and information service as a package provided to consumers. Competitive (alternative) local exchange companies can not generally compete solely on the basis of local exchange service and survive in the long term. It is the very ability to combine

¹²¹ Verizon at 41.

¹²² BellSouth 2001 Report to Shareholders at 6.

¹²³ Florida PSC at 6.

¹²⁴ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Comments of ALTS *et al.*, 98-103 (filed April 5, 2002) (discussing preconditions ILECs have placed on EELs to delay or deny CLECs access to EELs); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Petition for Declaratory Ruling of NuVox, Inc. (filed May 17, 2002) (seeking declaratory ruling that ILECs may not use limited audit exception to perform routine audits of all EELs).

local exchange service, data transport, long distance, new and innovative customer calling features and, in many cases, Internet access and information services that make alternative carriers attractive to business and residential consumers alike.¹²⁵

If the RBOCs succeed in convincing the Commission that the obligation to unbundle a particular network element depends on the RBOC's use of that element, they will also succeed in their efforts to limit CLECs' access to narrowband UNEs. Since CLECs cannot meet a customer's demand for integrated voice and data solutions using a narrowband UNE, such a result would put CLECs at a significant competitive disadvantage vis-à-vis the RBOCs. The likely outcomes of the Commission's proposed reclassifications include the creation of new regulatory uncertainties for CLECs struggling to fund their business plans as well as severe limitations on the applicability of Section 251 to RBOCs' narrowband voice telephone networks. Since the ILECs' narrowband networks are being replaced by broadband networks capable of supporting both voice and data applications, the Commission's proposed approach would completely eviscerate the market-opening provisions of Section 251 and 252.

D. Title II Regulation Is Essential to Prevent Discrimination and Anticompetitive Behavior in the Broadband Services Market

As demonstrated in this proceeding, common carrier regulation of the ILECs' provision of wireline broadband transmission services is necessary to prevent anticompetitive behavior and discrimination against competitors. A key issue in this debate is market power. What should be self-evident to the Commission, but nonetheless has been amply demonstrated in this proceeding, is that the ILECs continue to dominate the local transmission facilities market and have market power in the provision of wireline broadband transmission services. There can be no doubt that if left to their own devices, the ILECs will not make these services available to unaffiliated competitors. A primary purpose of common carrier regulation is to protect consumers from the negative effects of market power.¹²⁶ That is the reason for Title II regulation and the *Computer*

¹²⁵ Florida PSC at 5-6.

¹²⁶ See AT&T at 42-45.

Inquiry safeguards, which are specifically aimed at preventing the very result the ILECs seek to achieve in this proceeding—minimal regulation of monopoly broadband services and facilities. Such a result is contrary to the most basic antitrust principles.

The RBOCs attempt to confuse the issue when they refer to themselves as “new entrants” or “secondary players” in the broadband market, competing with cable modem providers.¹²⁷ This argument disregards the primary purpose behind common carrier regulation of the RBOCs’ transmission services. In fact, the RBOCs are the primary, if not the exclusive, players in the wireline broadband transmission services market. While the RBOCs’ broadband Internet access service may compete with cable modem service in some markets, CLEC and ISP access is a separate issue.

The states agree that the *Computer Inquiry* rules must remain in place to address the ILECs’ dominance in the broadband services market and are necessary to promote competition in broadband.¹²⁸ The states maintain correctly that the Commission’s proposal to lift the *Computer Inquiry* safeguards is inconsistent with the Commission’s long standing policy that recognizes that basic transmission service used in connection with information services is a bottleneck service.¹²⁹ The states have shown that nothing has significantly changed to justify removal of the safeguards and that the ILECs still have bottleneck control over broadband transmission facilities.¹³⁰ The states agree that the Section 251 unbundling and access requirements should continue to apply¹³¹ and that Section 271 authority should not serve as a trigger for deregulating ILEC broadband services. As long as the RBOCs have market power, the *Computer Inquiry* rules must remain in place.¹³² The Commission must remain focused on the

¹²⁷ Qwest at 16; SBC at 13.

¹²⁸ See, e.g., California PUC at 26-29; Vermont Board at 22.

¹²⁹ See, e.g., California PUC at 26.

¹³⁰ See, e.g., California PUC at 33-38.

¹³¹ State Consumer Advocates at 16; Minnesota Dept. of Commerce at 9.

¹³² California PUC at 39.

real concern—that the RBOCs still control bottleneck facilities that are the primary, if not the only, means for most CLECs and ISPs to reach their customers. Common carrier regulation of these facilities is essential to ensure that competing CLECs and ISPs have access to these critical facilities. Despite the RBOCs' claims, CLECs and ISPs do not have ready access to other broadband providers that compete with the RBOCs in the provision of broadband services. The RBOCs' market power over these broadband facilities therefore mandates Title II regulation.¹³³

VII. THE *COMPUTER INQUIRY* SAFEGUARDS ARE STILL NECESSARY TO PREVENT DISCRIMINATION BY THE RBOCS

The RBOCs argue that intermodal and intramodal competition justify elimination of the *Computer Inquiry* safeguards.¹³⁴ This argument is misplaced.¹³⁵ The *Computer Inquiry* safeguards were implemented to protect ISPs from discriminatory rates, terms, and conditions governing access to the underlying transmission capacity upon which the ISPs are dependent to provide their information services. Contrary to Qwest's assertion,¹³⁶ ISPs cannot simply turn to competing CLECs, cable modem providers and satellite providers for the broadband transmission needed for their Internet access services. The CLECs have faced formidable barriers to entry in building their networks and have nowhere near the extensive ubiquitous network, especially the critical "last mile," that the ILECs possess. Moreover, the cable operators and satellite providers are not required to provide ISPs access to their transmission facilities.¹³⁷

¹³³ Indeed, it is interesting to note that despite the BOCs' competitive claims, consumers still may not realize the benefits of competition between DSL and cable modem services. See Statement by Senator Ernest F. Hollings (D-SC), Hearing on "Promoting Local Competition: A Means to Greater Broadband Deployment," 2 (May 22, 2002) (noting that the incumbent Bell and cable monopolies have increased prices for their broadband services and "have demonstrated no real desire to compete head to head").

¹³⁴ BellSouth at 16; Qwest at 26.

¹³⁵ As demonstrated in the majority of the comments filed in this proceeding, intermodal and intramodal competition does not exist on a level sufficient to alleviate the anticompetitive and discriminatory concerns underlying the *Computer Inquiry* requirements. Despite the BOCs' claims, intramodal competition is scant at best. As for intermodal competition, ISPs simply do not have access to the facilities of other broadband providers, such as cable, satellite and wireless.

¹³⁶ Qwest at 23.

¹³⁷ While a few cable operators may be offering one or two ISPs access to their cable transmission facilities, this is a far cry from the hundreds of ISPs that have access to their customers through the ILECs' common carrier transmission facilities. See Qwest at 30 (offering consumers access to over 400 independent ISPs).

Thus, the ILECs' networks continue to be "the primary, if not exclusive, means through which information service providers can gain access to customers."¹³⁸ Clearly, this core assumption underlying the *Computer Inquiry* requirements still exists today, as evidenced by the Commission's similar findings as recently as last year.¹³⁹

Contrary to Qwest's arguments, without regulatory safeguards such as the *Computer Inquiry* rules and Title II, the RBOCs will still be able to use their "market power and control over the communications facilities *essential to the provision of enhanced services*"¹⁴⁰ in the wireline broadband market "to discriminate against unaffiliated information service providers in order to obtain anticompetitive advantages in the information services market."¹⁴¹ In order to have their theory adopted, the RBOCs must make a leap the Commission has not yet made – that the RBOCs are nondominant in local exchange and exchange access markets. The Commission has not made such a finding, nor has it even posed such questions in the *Nondominant* proceeding. Unless and until it reverses recent precedent finding that RBOCs retain the ability and incentive to use their market power in the local exchange and exchange access markets to unfairly disadvantage rival service providers, the Commission must retain the *Computer Inquiry* safeguards. Any finding, however misguided, that RBOCs are nondominant in the broadband services market, will not justify removal of Title II unbundling and *Computer Inquiry* safeguards.

Given that the Commission and the industry have fought for decades to introduce competition in the local exchange market, it is hard to believe that somehow, miraculously, in the last six months, the ILECs have relinquished control over their bottleneck transmission facilities.

¹³⁸ *NPRM* at ¶ 36.

¹³⁹ *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Report and Order, 16 FCC Rcd 7418, ¶¶ 12, 32, 38 (2001) (recognizing ILECs' continued dominance in local exchange market and explicitly affirming continuance of *Computer Inquiry* unbundling protections needed to protect competition in the enhanced services and CPE markets after CPE bundling prohibitions are removed).

¹⁴⁰ Qwest at 25 (citing *Computer II*).

¹⁴¹ Qwest at 25.

The reasons for implementation of the *Computer Inquiry* rules still exist today and retention of the *Computer Inquiry* safeguards is critical to the future of the broadband information services market.

The RBOCs argue that *Computer Inquiry* safeguards are not necessary because they have an incentive to offer consumers a choice of ISPs and to make the necessary service elements available to them.¹⁴² They submit that customer loyalty to their ISP of choice will drive this incentive. If this were true, however, then why are there not more ISPs gaining access to their customers over cable systems? A very limited number of ISPs have such access because cable companies are not required to provide such access. Indeed, the cable companies have only provided access to independent ISPs under extreme pressure from regulators and consumer groups. Moreover, as the experience with the cable operators demonstrates, only the largest ISPs will have the bargaining power to enter into reasonable arrangements with the ILECs, if at all. Clearly, the ILECs countervailing incentives as monopolists are to condition access to their bottleneck transmission facilities on unreasonable prices, terms and conditions. It is highly unlikely that Qwest, for example, would be offering its transmission services on non-discriminatory terms and conditions to over 400 independent ISPs absent common carrier regulation.¹⁴³ Thus, without the *Computer Inquiry* safeguards, the Commission will see a dramatic change in the information services landscape. The innovative, vibrant and extremely competitive information services market will shrivel to a few large ISPs lucky enough to gain access to ILEC bottleneck facilities. The ILECs, with a demonstrated history of minimal innovation and deployment of new technologies and services unless subject to competition, will control this market.

¹⁴² See, e.g., Qwest at 27-28, 30.

¹⁴³ Qwest at 30.

VIII. THE COMMISSION'S TENTATIVE CONCLUSIONS UNDERMINE THE ACT BY REMOVING SERVICES FROM CRITICAL NATIONAL SECURITY AND CONSUMER PROTECTION REQUIREMENTS

As many parties showed, classifying wireline broadband Internet access services as an information service with a telecommunications component would adversely affect the national security and consumer protection provisions adopted by Congress. Aside from the RBOCs, all parties that submitted comments on these subjects agreed that such a classification would undermine important national security and consumer protection goals.

A. National Security

The Secretary of Defense highlights the adverse impact that reclassifying wireline broadband Internet access services will have on national security and emergency preparedness, making clear that national security and emergency preparedness will be best served if wireline broadband Internet access remains subject to regulation by the Commission under Title II of the Act.¹⁴⁴

The Secretary of Defense is not the only government agency that opposes the Commission's proposed reclassification on national security grounds. The Department of Justice and the Federal Bureau of Investigation ("DOJ/FBI"), along with numerous competitive carriers and Internet service providers, also express concern about the impact the Commission's reclassification would have on CALEA, which applies only to telecommunications carriers.¹⁴⁵ As noted in the DOJ/FBI comments, classifying wireline broadband Internet access as an information service with a telecommunications component threatens to deny law enforcement a lawfully mandated point of access for intercepting communications and related information using this technology.¹⁴⁶ Exempting wireline broadband Internet access service providers from

¹⁴⁴ Secretary of Defense, at 2-3.

¹⁴⁵ Big Planet, Inc. at 47-48; Business Telecom, Inc. at *et al.* 28-29; DOJ/FBI at 1; DirecTV Broadband, Inc. at 37-38; Time Warner Telecom at 28.

¹⁴⁶ DOJ/FBI at p.6.

CALEA would be “contrary to the Commission’s prior holding and to law.”¹⁴⁷ The DOJ/FBI and the competitive carriers highlight the fact that the statutory and legislative history of CALEA make clear that Congress did not intend for the CALEA “information services” exemption to apply to all wireline broadband transmission services.¹⁴⁸ The DOJ/FBI emphasize that CALEA was intended to apply to equipment used to connect to the Internet, *regardless of whether a person uses a dial-up or broadband connection to gain access*.¹⁴⁹ Classifying wireline broadband Internet access as an information service with a telecommunications component would result in the illogical conclusion that dial-up Internet access is subject to CALEA, while wireline broadband Internet access is not.

Even though SBC and Verizon admit that classifying wireline broadband Internet access service as an information service with a telecommunications component would exempt such services from CALEA,¹⁵⁰ each attempts to minimize the impact by stating that facilities used to provide both broadband and traditional voice services will remain subject to CALEA.¹⁵¹ However, this argument ignores that technological convergence between the traditional telecommunications networks and the new fiber, broadband networks makes it much more difficult to distinguish between voice and broadband data services. In fact, Verizon alludes to this problem by acknowledging that classifying wireline broadband Internet access service as an information service with a telecommunications component could exempt “stand-alone” DSL service from CALEA.¹⁵² As state commissions warned, however, because of the difficulty of distinguishing between services, this exemption could also result in voice over DSL and other voice over broadband services escaping Title II and state regulation.¹⁵³ Thus, under the

¹⁴⁷ DOJ/FBI at p.6.

¹⁴⁸ Big Planet, Inc. at 47-48; Business Telecom, Inc. *et al.* at 28-29; DirecTV at 37-38.

¹⁴⁹ DOJ/FBI at 12.

¹⁵⁰ SBC at 38; Verizon at 41.

¹⁵¹ Verizon at 41.

¹⁵² Verizon at 41.

¹⁵³ *See, e.g.*, Ohio Commission at 38-39; Minnesota Dept. of Commerce at 7.

definitional approach to deregulation set forth in the *NPRM*, the migration of services to unregulated broadband could undo completely CALEA requirements.¹⁵⁴

B. Consumer Protections

State commissions, consumer advocates, competitive carriers and ISPs alike agree that classifying wireline broadband Internet access services as an information service with a telecommunications component will adversely impact consumer protection regulations.¹⁵⁵ Regulations concerning discontinuance of service, restrictions applicable to customer proprietary network information, rules relating to truth-in-billing, and safeguards against slamming would cease to apply to wireline broadband Internet access services. Because all of these protections are tied to the offering of a telecommunications service by a common carrier, the *NPRM* threatens to eviscerate all of these important consumer protections.

The RBOCs' attempt to minimize the negative impact that reclassifying broadband transmission service would have on consumer protection regulations are unpersuasive. SBC and Verizon dismiss such concerns by stating that the Title II customer protections will continue to apply because carriers will continue to provide voice or other telecommunications services to most of their customers.¹⁵⁶ However, even if such protections continue to apply to voice, they will not protect consumers purchasing broadband Internet access or broadband transmission services. Furthermore, as noted by at least one state commission, it is safe to assume that the ILECs will argue that the provision of any service, including traditional voice, over broadband facilities is removed from all state consumer protection requirements.¹⁵⁷ There is no reason to

¹⁵⁴ Big Planet, Inc. at 48; Business Telecom, Inc. *et al.* at 28-29; DirecTV Broadband, Inc. at 37-38; Mpower Communications at 12; Time Warner Telecom at 28.

¹⁵⁵ Alliance for Public Technology at 6-7; Big Planet, Inc. at 48-51; Business Telecom, Inc. *et al.* at 30-33; California PUC at 42; Covad Communications Company at 77; DirecTV Broadband, Inc. at 39-41; Minnesota Dept. of Commerce at 7; Penn. Consumer Advocates, *et al.* at 23; Rehabilitation Engineering Research Center on Telecommunications Access at 2,4-5; Texas Attorney General at 5; Texas PUC at 2,4; Time Warner Telecom at 28-29; Vermont Board at 6.

¹⁵⁶ SBC at 40-41; Verizon at 42.

¹⁵⁷ Minnesota Dept. of Commerce at 7.

believe that the same argument could not be leveled at federal consumer protection requirements as well. Therefore, the *NPRM* reclassification threatens to remove both data and voice services from the consumer protections adopted by Congress.

C. Intermodal Competition Will Not Sufficiently Protect Consumers

The Commission should not assume that intermodal competition will protect consumers because no competitive market exists. With the notable exception of the RBOCs, all parties commenting on this issue agreed that intermodal competition would not be sufficient to protect consumers.¹⁵⁸ As discussed herein, even in the few markets where multiple platforms exist, cable, wireline, satellite, and wireless broadband services are not interchangeable substitutes such that consumers may vote with their feet and easily switch between platforms.

The RBOCs argue that intermodal competition will deter discriminatory behavior by any one platform provider of broadband services. Central to the RBOC argument is the allegation that cable operators provide more high speed access lines than do the ILECs and are therefore dominant in the provision of broadband service. The RBOCs assert that RBOC-provisioned broadband services should not be subject to consumer protection regulation because cable operators serve more lines and need not comply with Title II consumer protection regulations.¹⁵⁹ The Commission should not assume that a cable/RBOC duopoly will protect consumers from discriminatory behavior.

¹⁵⁸ Business Telecom, Inc. *et al.* at 33-34; Calif. Internet Service Providers Assoc. at 26-27; California PUC at 41; DirecTV Broadband, Inc. at 33-34; Earthlink, Inc. at 29; KMC and NuVox at 23; Minnesota Dept. of Commerce at 7; New Hampshire ISP Assoc. at 8; Texas Attorney General at 5; Texas PUC at 2,4; Vermont Board at 12-13; WorldCom Inc., *et al.* at 25.

¹⁵⁹ BellSouth at 16; Qwest at 26; SBC at 13; Verizon at 12.

IX. THE IMPACT OF THE COMMISSION'S PROPOSALS ON USF FURTHER EXPOSES THEIR INCONSISTENCY WITH THE STATUTE

A. The RBOCs' USF Arguments Expose the Stark Self-Interest of Their Proposal To Reclassify ILEC Broadband Services From Telecommunications Services To Information Services

BellSouth and SBC unabashedly take highly inconsistent positions in their comments concerning the regulatory classification of broadband services. When it comes to the broadband transmission services they provide to ISPs and end users, they argue that broadband services are neither telecommunications services nor telecommunications in order to escape regulation. Yet when it comes to the issue of who should contribute to universal service, subsidies which go predominantly to ILECs, they reverse course and argue that cable modem and ISP broadband providers should be considered providers of telecommunications that must contribute to the universal service fund. For example, while arguing that its broadband Internet access service is an information service, BellSouth claims that the ISPs who offer this service to their customers are “by definition ... providers of interstate telecommunications.”¹⁶⁰ This exposes the absurdity of BellSouth's self-serving position on the statutory classification issue. How is it that a RBOC providing broadband Internet access provides only an information service but an ISP providing broadband Internet access provides telecommunications? The RBOCs cannot have it both ways. Wireline broadband Internet access either includes the provision of telecommunications (or a telecommunications service) or it does not.

As Allegiance and others have shown, ILEC wireline broadband Internet access does in fact include the provision of a telecommunications service, or, at the very least, the provision of telecommunications. The RBOCs' self-serving attempt to broaden the universal service contribution base by capturing previously unregulated services at the same time they seek complete deregulation of their own offerings only proves the absurdity of their argument that the

¹⁶⁰ Cf. BellSouth at 10-11 and BellSouth at 31. See also SBC at 45 (“all providers of telecommunications, including . . . ISPs and other content providers” should contribute to USF) and at 17 (“For the same reasons as in the cable modem context, wireline broadband Internet access services *uses* ‘telecommunications’”) (emphasis in original).

Commission may reclassify wireline broadband Internet access service as a unitary information service. For all of the reasons specified in Allegiance’s comments, and in order to ensure the sufficiency of the universal service fund, the Commission should reject its tentative conclusions in the *NPRM* and determine that ILECs’ provision of wireline broadband Internet access includes the provision of a telecommunications service that is subject to Section 251, the *Computer Inquiry* requirements, and universal service contribution obligations.

B. The Commission May and Should Require Providers of Broadband Telecommunications and Telecommunications Services to Contribute to Support All Universal Service Funds

The Commission must reject Verizon’s invitation to adopt discriminatory universal service contribution requirements that would violate the plain text of Section 254(d). Verizon argues that broadband providers should contribute to universal service, but only to support the schools and libraries program, in part because broadband providers are only eligible to receive reimbursement from that program.¹⁶¹ The Commission cannot entertain Verizon’s proposal that an obligation to contribute be tied to eligibility to draw support. Under Section 254, all providers of interstate telecommunications services must contribute to support universal service regardless of whether a particular class of provider can also draw support from the universal service fund. As the Commission previously found:

We reject Celpage’s argument that requiring contributions by paging carriers represents an unconstitutional tax because paging carriers do not derive any benefit from universal service. First, we note that although some paging carriers may be ineligible to receive support, all telecommunications carriers benefit from a ubiquitous telecommunications network. ... Some commenters also argue that carriers ineligible to receive support should be allowed to make reduced contributions to universal service. Because Section 254(d) states that “every telecommunications carrier that provides interstate telecommunications services” must contribute to universal service and does not limit contributions to “eligible carriers,” we ... reject these arguments.¹⁶²

¹⁶¹ Verizon at 42-45.

¹⁶² *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, ¶ 805 (1997) (“*Universal Service Order*”) (footnotes omitted) (subsequent history omitted).

This determination was upheld by the Fifth Circuit.¹⁶³ The Commission has consistently interpreted Section 254 to require all mandatory and permissive contributors to support all aspects of universal service and Verizon provides no reasoned basis that would justify reversal of the Commission's prior interpretation.

Linking contribution obligations for specific services to specific universal service programs would not only be inconsistent with the plain text of the Act, but would also establish a poor policy precedent. For example, IXCs, wireless carriers and CLECs that are not telecommunications carriers eligible for support from the high cost and low income programs would also have to be exempted from supporting those programs. In addition, interstate long distance services are not supported by either the Lifeline or high cost programs, so no carrier could be required to contribute to universal service based on its long distance revenues. In short, adopting Verizon's tying proposal would undermine the very purpose of the universal service fund. Instead of all telecommunications carriers and services making a contribution to support targeted Congressional goals, only the services and consumers that benefit from the targeted goals would contribute to support those goals. The Commission should therefore reject Verizon's proposal out of hand.

C. The Commission Must Address the Cost Allocation Issues Raised by Its Proposed Reclassification

The RBOCs summarily state that their preferred deregulatory approach has no impact on the Commission's cost allocation rules because they are subject to price cap, not rate based regulation.¹⁶⁴ However, many parties disagree. Although the Federal-State Joint Board on Separations "assumes" that "broadband plant and associated expenses and revenue will be removed from the provider's regulated books," it notes that important questions remain open.¹⁶⁵ For example, both the Joint Board and NARUC agree that a portion of the common plant used to

¹⁶³ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 426-30 (5th Cir. 1999).

¹⁶⁴ BellSouth at 18-19, 26-29; SBC at 21-22.

¹⁶⁵ Federal-State Joint Board on Separations at 2.

provide newly deregulated broadband services must be reallocated to the unregulated services.¹⁶⁶ The Consumer advocates agree, arguing that Section 254(k) requires that the Commission adopt a cost allocation mechanism.¹⁶⁷

Once again, the RBOCs' self-interest has blinded them to the complex and cascading consequences of a "simple" definitional reclassification. Given the small ILECs' concerns about cost recovery of their broadband investments through the NECA pool and explicit universal service subsidies, and the fact that many states rely on rate-based regulation,¹⁶⁸ it is clear that cost allocation is a major issue that the Commission must address if it insists on pursuing reclassification of broadband services. Because of the enormous impact such a reclassification could have on small ILECs and their rural customers, the Commission must examine and address, before reclassifying any services, the cost allocation complications that will flow from any such reclassification.

D. The Commission May Not Use This Proceeding to Determine that IP Telephony or VOIP Is a Telecommunications Service that Is Subject to Universal Service Contribution Obligations

In Section IV of the *NPRM*, the Commission seeks comment on "what universal service contribution obligations such providers of broadband Internet access should have as the telecommunications market evolves, and how any such obligations can be administered in an equitable and non-discriminatory manner."¹⁶⁹ It also asks whether commenters expect voice traffic to migrate to broadband Internet platforms and if so, what the impact of such migration would be on the Commission's ability to support universal service.¹⁷⁰ Not surprisingly, certain ILEC interests are attempting to use this proceeding to sweep IP telephony and Voice over Internet Protocol ("VOIP") into the category of a regulated telecommunications service and to

¹⁶⁶ *Id.* at 2-3; NARUC at 13.

¹⁶⁷ Pennsylvania Office of Consumer Advocate *et al.* at 43.

¹⁶⁸ Pennsylvania Office of Consumer Advocate *et al.* at 43.

¹⁶⁹ *NPRM* at ¶ 66.

¹⁷⁰ *NPRM* at ¶ 82.

subject such services to universal service contribution obligations.¹⁷¹ The Commission has rejected such efforts before and it must do so again in this proceeding.

The Commission did not seek comment on whether IP telephony or VOIP is a telecommunications service or information service. As the Commission has previously determined, it should not and will not classify such services as telecommunication services unless and until it has a complete record on which to evaluate the nature of the services.¹⁷² Any characterization of an evolving IP service for regulatory purposes without a detailed analysis would be futile and prejudicial. As the Commission previously found:

[w]e defer a more definitive resolution of these issues pending the development of a more fully-developed record because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as complete information and input as possible.¹⁷³

The Commission has also addressed ILECs' attempts at back-door regulation of IP telephony and VOIP in the context of a universal service proceeding:

[T]his Commission in its *April 10, 1998 Report to Congress* considered the question of contributions to universal service support mechanisms based on revenues from Internet and Internet Protocol (IP) telephony services. We note that the Commission, in the Report to Congress, specifically decided to defer making pronouncements about the regulatory status of various forms of IP telephony until the Commission develops a more complete record on individual service offerings. We, accordingly, delete language from the instructions that might appear to affect the Commission's existing treatment of Internet and IP telephony.¹⁷⁴

¹⁷¹ See NECA at 4-5, FW&A at 22-23.

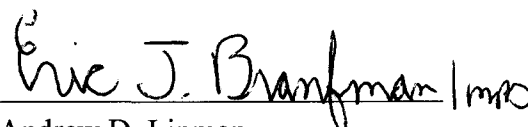
¹⁷² *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 111501, ¶ 90 (1998). ("Report to Congress").

¹⁷³ *Id.*

¹⁷⁴ *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, ¶22 (rel. July 14, 1999) (footnotes omitted).

The record in this proceeding focuses on what USF obligations should be imposed on providers of wireline broadband Internet access services. The record necessary to define IP telephony and VOIP,¹⁷⁵ and to determine whether such services are telecommunications services that should be subject to a host of regulatory requirements, did not exist in the *Report to Congress* or the *Telecommunications Reporting Worksheet* proceeding and does not exist in this proceeding. A hasty and uninformed decision in this proceeding could negatively impact a number of other important policy objectives. For instance, it could undermine the United States' position that IP telephony should not be subject to international regulation or the international settlements regime.¹⁷⁶ Because the implications of determining that IP telephony or VOIP are telecommunications services subject to universal service contribution obligations would extend far beyond this proceeding, the Commission should affirm its prior findings that such a determination will not be made unless and until a more complete record is developed on individual service offerings.

Respectfully submitted,

A handwritten signature in dark ink that reads "Eric J. Branfman" followed by a vertical line and the initials "mso".

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¹⁷⁵ As the Commission has previously recognized, these broad service categories may include many different types of services, including computer-to-computer, computer-to-phone, and phone-to-phone.

¹⁷⁶ *Report to Congress* at ¶ 93.